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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 PACIFIC FISHERIES, INC.,

10 Plaintiff,

11 v.

12 INTERNAL REVENUE SERVICE,

13 Defendant.  
14

CASE NO. C04-2436JLR

ORDER

15 This matter comes before the court on Defendant Internal Revenue Service's  
16 ("IRS") motion for summary judgment (Dkt. # 43) and its supplemental declaration (Dkt.  
17 # 55) filed in response to the court's request in its March 31, 2009 order. Having  
18 reviewed the papers, including the supplemental briefing submitted by the parties and  
19 heard the argument of counsel, for the reasons that follow, the court GRANTS the motion  
20 for summary judgment.  
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22 **I. BACKGROUND**

23 As the parties are well aware of the facts in this matter, the court incorporates by  
24 reference the background section found in its March 31, 2009 order.  
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26 **II. ANALYSIS**

27 Summary judgment is appropriate if the evidence, when viewed in the light most  
28 favorable to the non-moving party, demonstrates there is no genuine issue of material

1 fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*  
2 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the  
3 initial burden of showing there is no material factual dispute and he or she is entitled to  
4 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets its  
5 burden, the nonmoving party must go beyond the pleadings and identify facts which show  
6 a genuine issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.*, 200 F.3d  
7 1223, 1229 (9th Cir. 2000). This court conducts a de novo review of the IRS's response  
8 to the Freedom of Information Act ("FOIA") request. 5 U.S.C. § 552(a)(4)(B); *United*  
9 *States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755  
10 (1989). The burden is on the agency to show that its response was adequate. *Reporters*  
11 *Comm.*, 489 U.S. at 755.

12  
13 The court has already evaluated many of Plaintiff Pacific Fisheries Inc.'s ("Pacific  
14 Fisheries") arguments in opposition to summary judgment. The court therefore  
15 incorporates by reference the analysis section of its March 31, 2009 order. This order  
16 deals with two questions: (1) whether the declarations submitted by the IRS are  
17 sufficient to exempt documents from disclosure under FOIA on the basis that their release  
18 would seriously impair federal tax administration and (2) whether the definition of "tax  
19 convention information" is broad enough to encompass information sent from the United  
20 States to Russia.

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22 **A. Serious Impairment of Federal Tax Administration**

23 Pacific Fisheries argues that the IRS can release the documents it seeks under 26  
24 U.S.C. § 6103(c) which provides:

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26 **Disclosure of returns and return information to designee of taxpayer.**--The  
27 Secretary may, subject to such requirements and conditions as he may  
28 prescribe by regulations, disclose the return of any taxpayer, or return  
information with respect to such taxpayer, to such person or persons as the  
taxpayer may designate in a request for or consent to such disclosure, or to any

1 other person at the taxpayer's request to the extent necessary to comply with  
2 a request for information or assistance made by the taxpayer to such other  
3 person. However, return information shall not be disclosed to such person or  
4 persons if the Secretary determines that such disclosure would seriously impair  
5 Federal tax administration.

6 Pacific Fisheries has obtained the consent of the taxpayer to receive his return  
7 information. (*See* Declaration of Douglas W. O'Donnell ("O'Donnell Decl.") (Dkt. # 43-  
8 2), Ex. B.) The IRS responds that it has made a determination that disclosing the  
9 requested information would "seriously impair Federal Tax administration."

10 After the court declined to grant summary judgment based on Mr. O'Donnell's<sup>1</sup>  
11 conclusory first declaration regarding serious impairment, the court gave the IRS the  
12 opportunity to "file a more detailed declaration explaining why the release of the  
13 documents in question would seriously impair federal tax administration." (March 31,  
14 2009 Order (Dkt. # 54) at 10.) In response, the IRS filed another declaration from Mr.  
15 O'Donnell who stated that the purpose of his supplemental declaration was "to further  
16 explain my determination that the information withheld in this case pursuant to 26 U.S.C.  
17 § 6105 may not be disclosed to [Pacific Fisheries] because such disclosure would harm  
18 working relations with Russia and, therefore, would seriously impair federal tax  
19 administration within the meaning of 26 U.S.C. § 6103(c)." (Supplemental Declaration  
20 of Douglas W. O'Donnell ("Supp. O'Donnell Decl.") (Dkt. # 55) ¶ 2.)

21 Mr. O'Donnell asserts that the United States and Russia "have developed an  
22 ongoing and mutually beneficial treaty relationship" and that such "[t]reaty relationships  
23 are a critical element of federal tax administration." (Supp. O'Donnell Decl. ¶ 3.) Based  
24 on Mr. O'Donnell's "knowledge and experience, a high degree of mutual respect and  
25 trust between treaty partners is necessary for an ongoing and mutually beneficial  
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28 <sup>1</sup>Mr. O'Donnell is the Director, Treaty Administration and International  
Coordination, Large and Mid-Size Business Division, IRS. (*See* O'Donnell Decl. ¶ 1.)

1 relationship under an income tax treaty” and therefore “maintaining a high degree of  
2 mutual respect and trust with the Russian government is a significant concern of the  
3 United States Competent Authority” under the tax convention. (Supp. O’Donnell Decl. ¶  
4 4.) Mr. O’Donnell contends that IRS policy guidelines require that he refrain from  
5 disclosing information to a taxpayer when the treaty partner has requested that the  
6 information not be disclosed to the taxpayer. (Supp. O’Donnell Decl. ¶ 6.) Mr.  
7 O’Donnell states that “the Russian government confirmed to my office in 2005 its  
8 expectation of confidentiality with respect to information received from the Russian  
9 government” and “specifically requested that such information not be disclosed to  
10 [Pacific Fisheries].” (Supp. O’Donnell Decl. ¶ 7.) In a letter dated December 20, 2008,  
11 the “Russian tax authorities . . . reconfirmed this request . . . .” (*Id.*) Mr. O’Donnell  
12 believes “that failure to honor Russia’s expectations of confidentiality would disrupt the  
13 Russian government’s confidence in the exchange-of-information process and would chill  
14 future cooperation by Russia” which “would make it less likely the Russian government  
15 would provide exchange-of-information assistance under the treaty for U.S. tax cases,  
16 thereby interfering with the administration of U.S. civil and criminal tax investigations.”  
17 (Supp. O’Donnell Decl. ¶ 8.) United States confidence in the future cooperation of the  
18 Russian government would be diminished and would result in fewer requests under the  
19 tax convention, “materially impair[ing] the effectiveness of this treaty.” (*Id.*) Mr.  
20 O’Donnell also expressed concern that treaty relations with countries who have similar  
21 treaties with the United States “could be negatively affected if the United States in this  
22 case were found unable to honor its commitment to Russia on confidentiality.” (*Id.*)

23 Pacific Fisheries contends that Mr. O’Donnell’s declaration “is self serving  
24 speculation and cites no facts which permit the Court to make an independent  
25 determination that release of the information would seriously impair federal tax  
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1 administration.” (Resp. to Decl. (Dkt. # 57) at 2.) Pacific Fisheries also attacks Mr.  
2 O’Donnell’s reliance on IRS policy guidelines as well as his failure to attach the letters  
3 from the Russian government and to explain why information exchanged over eight years  
4 ago has the ability to impair federal tax administration.

5         It does not appear that the parties disagree that the Ninth Circuit standard for  
6 review of a serious impairment decision is de novo. *See Long v. Internal Revenue Serv.*,  
7 742 F.2d 1173, 1182 (9th Cir. 1984). The IRS has not argued that *Long* does not  
8 represent a correct statement of the law in this Circuit. The court concludes that *Long*  
9 correctly states the law in this Circuit and relies on it in its analysis of this case. The  
10 *Long* court held: “[W]e think that the Commissioner’s determination is entitled to  
11 deference, we emphasize that the district court’s review is still de novo and that the court  
12 must satisfy itself, on the basis of detailed and nonconclusory affidavits, that the  
13 Commissioner is correct in his belief that disclosure of [the requested information] by  
14 these plaintiffs would pose a substantial risk of impairing the collection, assessment, or  
15 enforcement of the tax laws.” *Id.* at 1182-83. The IRS bears the burden of proof on this  
16 issue. *Id.* The *Long* court also noted that: “We do not mean to imply that the  
17 Commissioner’s determination is to count for nothing. In particularly sensitive areas such  
18 as national security cases and cases involving investigatory records of law enforcement  
19 agencies, courts have accorded special deference to an agency’s detailed affidavits.” *Id.*  
20 at 1182.

21         The court disagrees with Pacific Fisheries’ characterization of Mr. O’Donnell’s  
22 declaration as “self-serving” speculation. First, the court likens this case, which involves  
23 foreign policy, to those involving sensitive areas like national security. In the national  
24 security context, courts have held that declarations are entitled to deference but they  
25 “must still describe the justifications for nondisclosure with reasonably specific detail,  
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1 demonstrate that the information withheld logically falls within the claimed exemptions,  
2 and show that the justifications are not controverted by contrary evidence in the record or  
3 by evidence of [] bad faith.” *Berman v. Cent. Intelligence Agency*, 501 F.3d 1136, 1140  
4 (9th Cir. 2007). The court acknowledges that cases involving national security issues and  
5 those involving foreign affairs are not entirely analogous. The court expects the level of  
6 detail in an affidavit in the foreign affairs context to be higher than the level of detail  
7 required in the national security context. Nevertheless, the court finds that the national  
8 security cases provide a sound framework for an analysis of the issues. Here, Mr.  
9 O’Donnell has provided specific justifications for why release of the material at issue  
10 would seriously impair federal tax administration. What Pacific Fisheries terms  
11 speculation is Mr. O’Donnell’s opinion based on his experience as the Director of Treaty  
12 Administration, as an IRS employee and from his discussions with others involved with  
13 this FOIA request. The court determines that Mr. O’Donnell’s declaration is well-  
14 grounded in experience rather than speculation and that it provides specific, legitimate  
15 reasoning behind the ultimate conclusion that federal tax administration would be  
16 impaired.<sup>2</sup> The court further determines that Mr. O’Donnell’s conclusions are entitled to  
17 some deference as the court is not in a position to independently determine what actions  
18 on the part of the United States government would or would not impair treaty relations  
19 with another nation. In terms of the other factors, Pacific Fisheries has not brought forth  
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25 <sup>2</sup>Contrary to Pacific Fisheries’ arguments, the declaration clearly explains why release of  
26 information exchanged eight years ago has the ability to impair federal tax administration. As Mr.  
27 O’Donnell states, release of such information would cause a disruption to the Russian  
28 government’s confidence in the exchange-of-information process and could have implications  
reaching far beyond the relationship between Russia and the United States. (*See* Supp. O’Donnell  
Decl. ¶ 8.)

1 contrary evidence controverting Mr. O'Donnell's justifications or suggesting that there is  
2 any bad faith on the part of the IRS.

3 Pacific Fisheries also attacks Mr. O'Donnell's reliance on Internal Revenue  
4 Manual 11.3.25.2(8) which generally provides for release of information received from a  
5 foreign tax authority pursuant to a tax treaty, except where, "the IRS or the foreign tax  
6 authority providing the information objects to disclosure or if disclosure would seriously  
7 impair Federal tax administration." (Supp. O'Donnell Decl., Ex. A.) Pacific Fisheries is  
8 correct that the policy can be read to favor disclosure of the information; however, here,  
9 the IRS has determined that disclosure would seriously impair federal tax administration.  
10 Having determined that the IRS's decision to withhold the documents based on serious  
11 impairment rests on sound footing, the court need not address whether Russia did or did  
12 not object to the disclosure of the documents. The record, however, does indicate that the  
13 Russian authorities have stated their "desire," "expectation" and reaffirmed their "original  
14 wish" that the documents at issue remain confidential. (O'Donnell Decl. ¶¶ 6-7; Supp.  
15 O'Donnell Decl. ¶ 7.)<sup>3</sup> Although Pacific Fisheries argues to the contrary, the court finds  
16 that these communications by the Russian government were appropriate for Mr.  
17 O'Donnell to consider and rely upon when making his ultimate determination that  
18 disclosure of the documents would seriously impair federal tax administration.  
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21 After a review of the declaration and Pacific Fisheries' objections to it, the court  
22 determines that Mr. O'Donnell has provided detailed justifications that demonstrate that  
23 federal tax administration would be seriously impaired if the documents at issue were  
24 released. The court further determines that Mr. O'Donnell's determination regarding  
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26 <sup>3</sup>Relatedly Pacific Fisheries contends that the IRS should have attached the letters from the  
27 Russian authorities discussed by Mr. O'Donnell in his declaration. The court accepts the IRS's  
28 explanation that it would have been improper for Mr. O'Donnell to attach the letters because they  
contain tax convention information.

1 serious impairment is entitled to deference based on the foreign policy interests at stake in  
2 this case. The court is satisfied that the IRS's conclusion that federal tax administration  
3 would be seriously impaired by release of the documents is correct.

4 **B. Information Provided by the United States to Russia**

5 In the alternative, Pacific Fisheries argues that "at a minimum" it is entitled to  
6 disclosure of information provided by the United States to Russian authorities even if it is  
7 not entitled to information provided by the Russians to the United States.<sup>4</sup> It contends  
8 that the IRS takes too broad a view of the term "tax convention information" as including  
9 information that relates to and/or reflects on information that it received from Russia.  
10

11 Pacific Fisheries believes that "the government interprets the scope of legally protected  
12 information beyond that allowed by law and views its power to determine what will be  
13 disclosed without boundary, so long as it asserts that federal tax administration will be  
14 seriously impaired." (Resp. to Decl. at 7.) The IRS responds that the definition of "tax  
15 convention information" in the statute is broad enough to cover information relating to  
16 and reflecting on information it received from Russia. The court agrees with the IRS.  
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18 "Tax convention information" is defined in relevant part as any "other information  
19 exchanged pursuant to a tax convention which is treated as confidential or secret under  
20 the tax convention." 26 U.S.C. § 6105(c)(1)(E). The IRS also points to the legislative  
21 history underlying § 6105 which expresses Congress's intent that "tax convention  
22 information" be defined broadly: "The conferees intend that tax convention information  
23 would include documents and any other information that reflects tax convention  
24 information, including the association of a particular treaty partner with a specific issue  
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27 <sup>4</sup>The court granted leave for Pacific Fisheries to brief only issues regarding the sufficiency  
28 of additional declarations from the IRS. (See March 31, 2009 Order at 10.) Although Pacific  
Fisheries' arguments exceed this scope, the court will briefly address and resolve this argument.

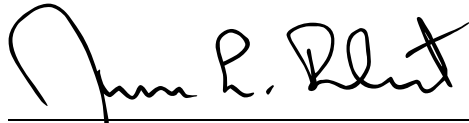


1 or matter.” H.R. Conf. Rep. 106-1033 at 1011 (2000). Here, from the statutory  
2 definition and legislative history it is clear that communications that relate to and reflect  
3 on information received from Russia are encompassed within the definition of tax  
4 convention information. Pacific Fisheries’ bare assertion, without citation to authority,  
5 that the definition of “tax convention information” does not include documents relating to  
6 and reflecting on information received from a treaty partner, is not enough to overcome  
7 the plain meaning found in the definition of “tax convention information” in the statute.  
8 The court determines that documents withheld on this basis are properly withheld under  
9 26 U.S.C. § 6105(a) and 5 U.S.C. §552(b)(3).  
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### 11 **III. CONCLUSION**

12 For the foregoing reasons, as well as the reasons articulated in the court’s March  
13 31, 2009 order, the court GRANTS the IRS’s motion for summary judgment.  
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15 Dated this 6th day of May, 2009.

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18 JAMES L. ROBART  
19 United States District Judge  
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